Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

DAVID SELINGER -- PETITIONER

VS.

SCHLAGE LOCK COMPANY,

INGERSOLL-RAND COMPANY,

CNA INSURANCE CO.,
DBA TRANSPORTATION INSURANCE COMPANY,

WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA,

--RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA
(The Last Court to Rule on the Merits)

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTION PRESENTED FOR REVIEW

Is a plaintiff's U.S. Constitutional 14th Amendment right to due process violated when a state trial judge does not give the plaintiff prior notice of the court's intention to ignore a defendant's judicial admission of material fact made against interest in its answer to the complaint, and then makes a finding of material fact contrary to such judicial admission?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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BASIS FOR JURISDICTION

The California Supreme Court filed its discretionary denial of review on March 18, 1998. The instant petition to this Court was mailed to the Clerk of this Court by First Class U.S. Postal Service Mail within 90 days from the date of said filing of said California Supreme Court ruling.

This Court has jurisdiction to rule on interpretations of amendments to the U.S. Constitution. This petition raises a question of first impression of application of the 14th Amendment of the U.S. Constitution to a state trial proceeding.

CONSTITUTIONAL PROVISION

The constitutional provision involved in this case is the due process clause of the 14th Amendment to the U.S. Constitution which states, in pertinent part:

"...nor shall any State deprive any person of life, liberty, or property, without due process of law; ..." [Emphasis added.]

STATEMENT OF THE CASE AS IT PERTAINS TO THE QUESTION PRESENTED

Petitioner, as a pedestrian, was hit by a car while on a business trip for his employer, defendant Schlage. The California Workers' Compensation Appeals Board (Board) found petitioner's injuries to be work-related. That finding was not appealed and is final.

During his employer-approved medical leave-of-absence from work to recuperate, petitioner's job was eliminated and the employer, Schlage, during such leave-of-absence informed petitioner by letter dated 6/20/86 that: (a) elimination of his job did not sever the employment relationship; (b) that petitioner was prohibited from returning to work without first becoming fully medically released by his doctor for return to work; and (c) that petitioner would be considered for open positions only after he was fully medically released for return to work. Despite the letter, the following week the employer recorded in its personnel records that petitioner was "terminated" "effective 6/27/86". Two weeks later, on 7/11/86, the employer sent petitioner a termination letter thanking him for his services to Schlage Lock Company which was accompanied with previously earned but unpaid vacation and holiday pay plus 2 weeks severance pay. Petitioner's full medical release for return to work would have been effective on 7/23/86.

Petitioner filed with the Board a complaint in which he alleged he was

discharged from his employment because of his work injuries (i.e. he was discharged without a compelling business reason) in violation of the work-injury anti-discrimination statute California Labor Code section 132a. The employer filed an answer which explicitly admitted it discharged petitioner and raised a "business necessity" defense for doing so. Schlage's 2-page answer, dated March 20, 1990, stated on page 2, lines 17-19: "Applicant's discharge from employment was premised on 'compelling business reasons' and the realities of doing business."

Despite the defendant's judicial admission of discharge in its answer to the complaint, the state trial judge in the Board proceedings gave no notice to petitioner that he intended to ignore the judicial admission of discharge and then found that the trial evidence did not reliably show that petitioner was discharged. (See Appendix B) p.19. This in effect was a ruling that petitioner had abandoned his employment (i.e. quit). As a result petitioner could not even make out a prima facie case and therefore lost his case of wrongful discharge.

Petitioner filed a Petition for Reconsideration with the Board in which he raised the issue of the employer's admission of discharge it had made in its answer to the complaint and that the 2-page answer was brought to the trial judge's attention during the trial by way of a request to take judicial notice of it. In said petition for reconsideration, at page 54, commencing at line 13, petitioner stated:

"In addition, in applicant's motion in limine, filed 4/29/96, applicant attached copies of Answers filed by the employer in opposition to his section 132a petition. Attached to the motion as Exhibit "C" was Schlage's "Answer to Petition for Award Under Labor Code Section 132a (Unlawful Discharge "A"), dated March 20, 1990. On page 2, line 17, the employer explicitly admitted that applicant was "discharged." This was a party-admission since it was signed and filed by Schlage's attorney, Mr. Munoz, who was authorized to speak on behalf of the party on the issue of wrongful termination. The party is bound by the acts of its agent and attorneys. By attaching the employers' Answer to his motion, the applicant was requesting the WCJ to take judicial notice of it. A court may take judicial notice of documents in its own files and a party's reference to them is a proper request for judicial notice (Stepan v. Garcia (1974) 43 CA3d 497, 500, 117 CR 919). A party's pleading that references a court-filed document properly brings to the court's attention documents to be judicially noticed. (Stafford v. Ware (1960) 9 CR 706, 709-712; 187 CA2d 227)."

The Appeals Board denied reconsideration without any comment on the merits.

Petitioner then sought review with the California Court of Appeal. In Petitioner's Petition for Writ of Review in said court, petitioner again raised the issue of the

employer's judicial admission of discharge in its answer. In said petition, at page 14, middle of the page, petitioner stated:

> "THE EMPLOYER ADMITTED TERMINATION IN ITS ANSWER TO THE COMPLAINT. Employer Schlage admitted to discharging petitioner in its filed answer which stated: "Applicant's discharge from employment was premised on 'compelling business reasons' and the realities of doing business." (See Schlage's ANSWER TO PETITION FOR AWARD UNDER LABOR CODE section 132a (UNLAWFUL DISCHARGE "A", dated March 20, 1990), filed herewith in Volume 2, marked Exh. E.) During his case-in-chief, petitioner requested the WCJ [Workers' Compensation Judge] to take judicial notice of this answer. (See Exh. C that is attached to petitioner's motion in limine, filed Apr. 29, 1996.) By making reference to Schlage's answer petitioner had properly asked that judicial notice be taken of it. A court may take judicial notice of documents in its own files; a party's reference to such filed documents was a proper request to take judicial notice of them. (Stafford v. Ware (1960) 187 CA2d 227, 9 CR 706, 709-712); (Stepan v. Garcia (1974) 117 CR 919; 43 CA3d 497, 500). Since the WCJ's discussion of the evidence doesn't mention the employer's admission of termination, the WCJ erroneously failed to take judicial notice of it as was compulsory under Evidence Code section 453. Thus the WCJ failed to weigh the most material evidence of termination -- the employer's own admission... ...[Heading:] THE WCJ AND THE BOARD VIOLATED PETITIONER'S RIGHT

TO DUE PROCESS NOTICE THAT IT WAS GOING TO IGNORE THE EMPLOYER'S ADMISSION OF TERMINATION IN ITS ANSWER TO THE WRONGFUL TERMINATION PETITION...The purpose of a stipulation is to narrow the issues for more efficient proceedings. The employer's answer which admitted to termination, against its own interests, was tantamount to a stipulation. Petitioner was put on notice by the employer that termination was not at-issue. WCAB Rule 10497 states in pertinent part: 'No finding shall be made contrary to a stipulation of the parties on an issue without giving the parties notice...' No notice was given to petitioner. The record is devoid of any notice by the WCJ, the Board, or any defendant, to petitioner that it would make a finding contrary to what was in effect a stipulation of termination. This failure to give notice violated petitioner's right to due process notice as guaranteed by the 14th Amendment of the U.S. Constitution [emphasis added], and petitioner claims the benefit and protection of this right. Because no notice was given, the finding of 'no termination' must be reversed."

The Court of Appeal denied the petition for writ of review with no comment on the merits.

Petitioner then filed a Petition for Writ of Review with the California Supreme Court. In said petition, commencing at page 11, petitioner stated:

"[heading:]THE WCAB'S FAILURE TO GIVE NOTICE THAT IT INTENDED TO DISREGARD THE EMPLOYER'S JUDICIAL ADMISSION OF DISCHARGE REQUIRES THAT THE ADMISSION BE DEEMED CONCLUSIVE OF THE FACT OF DISCHARGE AND THE WCAB'S FINDING OF NO DISCHARGE MUST BE ANNULLED..."

Petitioner then repeated the same argument as stated above in his Court of Appeal petition for writ of review and also stated at page 13, middle of page:

"The Board's failure to give notice to petitioner clearly violated his right under WCAB Rule 10497. It also violated his right to due process notice or the due process of a fair trial, both of which are guaranteed to him by the 14th Amendment to the U.S. Constitution [emphasis added]. Petitioner claims the benefit and protection of all these rights."

The California Supreme Court denied review without any comment on the merits.

REASONS FOR GRANTING THE WRIT

In federal proceedings a defendant's judicial admission in its answer to the complaint precludes the admitted fact from being an issue at trial. Federal Rule of Civil Procedure 8(b). The instant petition raises the issue of first impression of

whether such a rule also applies to state proceedings by virtue of the due process clause of the 14th Amendment to the U.S. Constitution.

In Abrazinski v. Dubois 876 F. Supp. 313, 321 (D. Mass. 1995) the court said:

> "The purpose of admitting or denying allegations in a complaint is to put the parties on notice of what issues are in dispute. See 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure section 1261 at 382. '[A] defendant's pleading should apprise the opponent of the allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to be established to enable the plaintiff to prevail." Id. (emphasis added)". See also Lopez v. U.S. Fidelity & Guar. Co. 18 F.R.D. 59 (D.Ark.1955) (The purpose of Rule 8(b) regarding answers is to prevent surprise)."

Schlage's 2-page answer, dated March 20, 1990, filed in the Workers' Compensation trial proceeding, stated on page 2, lines 17-19:

> "Applicant's discharge from employment was premised on 'compelling business reasons' and the realities of doing business."

Petitioner is requesting this Court to grant review and ultimately reverse the trial court's finding of no discharge with remand

for determination of the date of discharge and whether the evidence showed if on said date there existed a business necessity for discharge, and if so, whether or not petitioner rebutted the defense.

If this Court reverses the finding of "no discharge", then petitioner will prevail in this action because of the employer's (Melteff's) letter of 6/20/86 in which the employer promised petitioner that he would be considered for available positions when he became fully medically released and which also stated that there was no necessity for severing the employment relationship while petitioner was still recuperating and not yet released by his doctor for return to work.

Because the state trial judge ignored the employer's judicial admission of discharge, he erroneously limited his analysis on whether elimination of the job was necessary rather than whether the discharge, when it occurred, was necessary.

Trial Exhibit 1 (not mentioned by the WCJ in his opinion on decision) is the employer's own business personnel form, signed by two managers, which states "Dave Selinger", "termination" "effective date 6/27/86".

Trial Exhibit 17 (also not mentioned by the WCJ in his opinion on decision), a letter from Schlage to petitioner, notified petitioner his employment was over (thanking him for his services with Schlage) was accompanied with payment for unused vacation and holiday pay, plus two weeks severance pay.

Trial Exhibit 18, petitioner's medical release by his doctor for return to work shows that petitioner would have been released for return to work on 7/23/86.

Thus after promising petitioner by letter dated 6/20/86 that he could complete his recuperation up to his medical release by his doctor and would then be considered by the employer for open jobs upon becoming medically released, the employer discharged petitioner effective 6/27/86, which was one month prior to his effective medical release of 7/23/86. Because the discharge was premature it was not necessary. The trial judge was able to avoid this analysis because he avoided the admitted fact of discharge.

The state trial judge violated petitioner's 14th Amendment due process right of a fair trial by deciding a fact issue that was excluded from the trial: the fact of discharge, and/or by not giving prior notice to petitioner that he intended to ignore the employer's judicial admission of discharge in its answer to the complaint so that petitioner would be on notice during his discovery to obtain sufficient evidence to prove discharge at trial.

Early in the proceedings petitioner was lulled into believing that a material fact in his prima facie case was not at issue. For the trial judge to put it into issue -- without notice to petitioner -- after the issue had been eliminated from the trial by the employer's judicial admission -- was a clear violation of due process.

CONCLUSION & PRAYER

Admitting to a material fact in an answer to the complaint eliminates that issue from the trial. The admitted fact is conclusive, otherwise the plaintiff cannot know which facts the defendant seeks to put in issue and which not. This is fundamental to due process. If the trial judge decides for any special or extraordinary reason to circumvent this rule, he should be required to give notice to the plaintiff that he is reviving the admitted fact to be a fact issue to be tried -- how else is the plaintiff to know his burden of proof at trial?

This Court should extend the federal rule to state proceedings under the due process clause of the 14th Amendment.

Wherefore, petitioner respectfully requests this Court grant a writ of certiorari to the Workers' Compensation Appeals Board of the State of California.

DECLARATION RE WEIGHT OF PAPER OF THIS BRIEF

U.S. Supreme Court Rule 33, 1(c), states the requirement that this brief be produced on paper "not less than 60 pounds in weight". About 1 week prior to the date of this brief I personally telephoned the Clerk of this Court to inquire if this was correct and was informed by Ms. Ruth Jones of this Court that "60 pounds" was incorrect and she stated that regular typing paper could be used instead. Ms. Jones stated that no specific weight paper was required.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: JUNE 16, 1998

Respectfully submitted by:

David Selinger

David Selinger
Petitioner in Pro Se

APPENDIX A

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD
Case No. SDO 114450

DAVID SELINGER, Applicant(s),
v.
CNA INSURANCE COMPANY,
Defendant(s).

FINDINGS AND ORDERS

The issues(s) raised at regular hearing and identified in the minutes of hearing, having been regularly heard and submitted, the Honorable Ronald W. Smitter, workers' compensation judge, finds and awards/orders as follows:

FINDINGS OF FACT

1. Defendant did not discriminate against applicant in any manner because of his workers' compensation claim and applicant's job position was eliminated as a matter of business necessity.

2. Defendant did not unreasonably delay payment of compensation.

ORDERS

IT IS ORDERED that applicant's petitions/amended petitions for violation of Labor Code section 132a be, and they hereby are, denied with prejudice.

IT IS FURTHER ORDERED that applicant's claim for penalty pursuant to Labor Code section 5814 be, and hereby is, denied with prejudice.

DATED: 6-20-97

Filed and Served by mail on parties on the Office Address Record
/s/ Marilyn McGaughy
By: Marilyn McGaughy

/s/ Ronald W. Smitter
RONALD W. SMITTER
WORKERS' COMPENSATION JUDGE

A petition for reconsideration from this Decision shall be filed only at the San Diego District Office of the Workers' Compensation Appeals Board.

APPENDIX B

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD
Case No. SDO 114450

DAVID SELINGER , Applicant,
v.
CONTINENTAL CASUALTY COMPANY,
Defendant.

OPINION ON DECISION

Presented for adjudication are defendant's liability for Labor Code section 132a violation and penalty for unreasonable failure or delay to furnish benefits pursuant to Labor Code section 5814. For reasons to be discussed, the workers' compensation judge (WCJ) concludes that applicant has failed to bear his burden of proof on both issues. Consequently, the WCJ will not reach the question of whether or not applicant's petition for Labor Code section 132a violation is barred, in whole or in part, by the statute of limitations.

Having reviewed the voluminous documentary evidence and considered the testimony and credibility of numerous witnesses called during the course of multiple full days of regular hearing, the WCJ concludes that defendant did not discriminate against applicant in a

statutorily proscribed manner. Rather, the evidence considered as a whole establishes that applicant did not return to employment at Schlage Lock due to elimination of his job position as a result of business necessities. Ample evidence exists to support to this conclusion, including the credible testimony of Claudia Melteff, Thomas Abbott, Jr., Lee Edward Hoffman, Eduardo Acosta, and even portions of applicant's own testimony.

Ms. Melteff testified credibly that she was employed by Schlage Lock since 1971 and she was the plant human resources manager in 1986 while applicant worked for that company. Applicant's employment position was eliminated while he was out on medical leave as documented by applicant's exhibit "15." The June 20, 1986 letter indicated that: (a) applicant's position as plant administrator was eliminated as a part of restructuring and downsizing; (b) the business decision did not automatically sever applicant's relationship with the company; and (c) when authorized by the doctor to return to work, applicant would be considered for any available openings. Each of the elements discussed in the letter is corroborated by other documentary evidence and credible evidence and credible testimony of various witnesses.

The great weight of the evidence establishes that Schlage Lock was in the throes of major reorganization in the mid-1980's designed to streamline its operations and save costs. Mr. Abbott credibly testified

(as a twenty-seven year employee of Schlage Lock and as applicant's immediate supervisor when he worked at the Tecate plant as plant administrator) that he first learned applicant's employment position was going to be eliminated four to six months after applicant's industrial injury. Mr. Abbott had been assigned to supervise the Tecate plant in 1986. Schlage Lock contracted with an American company as a vendor and that company, in turn, contracted with the Mexican company. General dissatisfaction existed with the timeliness and quality of delivery of vendors assigned to the Tecate plant. Applicant was initially hired to address those concerns as the plant administrator of the Tecate plant. Mr. Abbott indicated that defendant's exhibit "A" establishes applicant would have received notice of the reorganization efforts as part of the normal distribution of the memo. Defendant's exhibit "A" consists of an interdepartmental memorandum dated January 21, 1986, which discussed major restructuring to be implemented between the years 1986 and 1989. Mr. Abbott was emphatic that negotiations were well under way in January 1986 to bring on board Collectron as a shelter company.

According to Mr. Abbott, Collectron became responsible for the duties which applicant had handled before his industrial injury on March 3, 1986. Those duties included obtaining necessary permits, ensuring transit of workers, etc. The reorganization of the Tecate plant was part of a larger restructuring effort which

included, for example, reorganization of the Rocky Mount facility in North Carolina. That facility closed in 1984 or 1985 resulting in a loss of 1,000 to 1,200 jobs.

Mr. Abbott testified that Collectron's involvement at the Tecate plant meant Ensambles Mecanicos, a vendor applicant had worked with, was no longer needed. Collectron had its own employees. Applicant's position was not eliminated because of his industrial injury; rather, developments at the Tecate plant which were part of a larger pattern of reorganization resulted in elimination of applicant's job position.

The testimony of both Mr. Acosta and Ms. Melteff is consistent with the testimony of Mr. Abbott and establishes a credible and legitimate business reason for the termination of applicant's job position. For example, Ms. Melteff testified that as plant personnel manager, she was aware of discussions being held in mid-1985 with Collectron of Arizona to provide administrative services at the Tecate plant. Schlage Lock was dissatisfied with the vendors for various reasons which included high labor turnover, inability to control costs, and trouble shipping items across the border. Ensambles Mexicanos was one of those vendors. Applicant's job duties were ones which were taken over by Collectron and his position as plant administrator was eliminated for reasons wholely unrelated to his industrial injury.

Mr. Acosta testified that he has been employed by Collectron for twelve years. Tecra of Mexico is a division of Collectron of Arizona which was formed in early 1986 to give support services to Schlage Lock in Mexico. It was a shelter company for Schlage which had a facility in Tecate. Tecate was to provide administrative and not technical services. Mr. Acosta became the administrative manager of the Tecate plant.

Although Collectron legally took over operation of the Schlage Tecate plant on October 1, 1986, Mr. Acosta indicated that the company was initially approached sometime in 1984 or 1985 to operate a shelter program for Schlage Lock. Mr. Acosta confirmed that the duties performed by Collectron were generally the same ones which applicant performed.

The testimony of Lee Edward Hoffman, a witness called by applicant, was viewed by the WCJ as being entitled to less than full weight. Mr. Hoffman's testimony at regular hearing was impeached on several material points by his earlier deposition testimony. For example, Mr. Hoffman indicated his separation from Schlage Lock was amicable when he testified at deposition that it was not. He also testified at regular hearing that he was unaware prior to January 1986 that Collectron was taking over the Tecate plant, but he indicated the opposite in his deposition. Nonetheless, Mr. Hoffman confirmed at regular hearing that he was aware the company was constantly being

reorganized in 1986 and that he was aware as of mid-1985 of the discussion of various options. Collectron took over management of all plants on the Mexican side of the border and Mr. Hoffman understood that a majority of the management duties assumed by Collectron were ones previously performed by applicant.

Furthermore, the evidence does not reliably establish that Schlage Lock ever actually terminated applicant's employment. [emphasis added.] Applicant's exhibit "13" establishes that he was placed on an unpaid leave of absence effective on the March 3, 1986 date of his industrial injury. In a letter dated March 31, 1986 (applicant's exhibits "8" and "9"), applicant inquired regarding the company's workers' compensation coverage. Applicant signed a notice of claim on April 16, 1986 as evidenced by applicant's exhibit "11." However, personnel at Schlage Lock still expected applicant to eventually return to work as documented by the May 12, 1996 letter which was admitted into evidence as applicant's exhibit "5." Even the notice of termination which was prepared on June 23, 1986, to be effective June 27, 1986 [emphasis added.], indicated that no replacement was required for applicant.

In a letter dated June 17, 1986 (applicant's exhibit "14"), applicant wrote to Schlage Lock that he wanted to receive a severance check which had been offered the preceding Monday. There is conflicting evidence whether applicant's employment relationship with Schlage Lock was considered

by any of the involved parties to be terminated as of June 1996, but it is clear that his position as plant administrator was eliminated and that efforts to place him in alternative job openings with the company were unsuccessful.

Ms. Melteff's letter of June 20, 1986 indicated that applicant would be considered for any available job openings when he was authorized by his doctor to return to work. [emphasis added.] Applicant testified that he first provided the company with such a medical release in December 1987. Dr. Grisolia may have returned applicant to work on a trial basis on July 23, 1986 (applicant's exhibit "18") [emphasis added.] but there is no indication that information was conveyed to the employer. Similarly, Dr. Kane indicated applicant could return to work on June 17, 1986 applicant's exhibit "19"), but his letter was dated December 17, 1987 and was directed "to whom it may concern."

In summary, the evidence does not preponderate in favor of the conclusion that defendant discriminated against applicant because of his industrial injury. To the contrary, the evidence shows that applicant was caught up in a much larger restructuring campaign which resulted in elimination of his employment position while he was coincidentally out on medical leave of absence. Applicant did not present defendant with a medical release to return to work until December 1987 long after Collectron had taken over the Tecate plant.

In light of the evidence reviewed, applicant has failed to demonstrate by a preponderance of the evidence that defendant unreasonably failed to provide workers' compensation benefits. The evidence introduced by applicant on this subject is simply insufficient to meet his burden of proof.
DATED: 6-20-97

Filed and Served by mail on parties
on the Office Address Record
/s/ Marilyn McGaughy
By: Marilyn McGaughy

/s/ Ronald W. Smitter
RONALD W. SMITTER
WORKERS' COMPENSATION JUDGE

APPENDIX C

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

DAVID SELINGER, Applicant(s)

v.

SCHLAGE LOCK COMPANY,
INGERSOLL-RAND COMPANY,
CNA/TRANSPORTATION INSURANCE COMPANY,
Defendant(s)

CASE NO. 87 SDO 114450

REPORT AND RECOMMENDATION OF
WORKERS' COMPENSATION JUDGE
ON PETITION FOR RECONSIDERATION

NATURE OF PETITION

Applicant, David Selinger, in propria persona, has filed a timely, properly verified petition for reconsideration on recognized statutory grounds of a decision issued June 20, 1997, in which the workers' compensation judge (WCJ) found that: defendant did not discriminate against applicant in any manner because of his workers' compensation claim and applicant's job position was eliminated as a matter of business necessity; and (2) defendant did not unreasonably delay payment of compensation.

Applicant contends essentially in his 104 page petition that the weight of the evidence supports contrary findings and the WCJ erred procedurally and in rulings made at the time of trial.

Timely answers to the petition have been filed by both defendants Schlage Lock Company (on the Labor Code section 132-a violation) and CNA Insurance Company (on the penalty claim).

STATEMENT OF FACTS

Review of these files unmistakably reveal the tortuous path adjudication of this claim has taken. At regular hearing on July 11, 1996, the sole remaining issues raised for adjudication were liability for applicant's petition for Labor Code section 132-a violation and liability for Labor Code section 5814 violation for unreasonable failure or delay to furnish benefits. Regular hearings proceeded over the course of multiple additional full days during which numerous witnesses were called to testify and voluminous documentary evidence was received into evidence. The record was carefully and painstakingly developed on each of those occasions as is reflected in the various minutes of hearing.

Suffice it to say that the parties were embroiled in a multi-year discovery battle before the WCJ who conducted the trial was assigned to this case.

The salient facts can be briefly summarized. Basically, applicant sustained an

industrial injury on March 3, 1986, while employed as the Plant Administrator for the Tecate Plant of Schlage Lock Company. Defendant had already explored the prospects of contracting with Collectron to assume the administrative operations of the Tecate Plant. Such discussions were well underway by mid 1985 according to the testimony of Mr. Abbott, Ms. Melteff, and Mr. Acosta. The services which were to be provided by Collectron were the same ones which applicant had been performing prior to his industrial injury. The need for the position of a plant administrator ceased when Collectron came on board and the position was, therefore, eliminated in June 1986.

Attempts were made within the Company to find alternative employment for applicant. When those attempts proved unsuccessful, applicant requested and received severance.

DISCUSSION

As pointed out by the WCJ in the opinion on decision issued June 20, 1997:

"Presented for adjudication are defendant's liability for Labor Code section 132a violation and penalty for unreasonable failure or delay to furnish benefits pursuant to Labor Code section 5814. For reasons to be discussed, the workers' compensation judge (WCJ) concludes that applicant has failed to bear his burden of proof on both issues. Consequently, the WCJ will not reach the question of whether or not applicant's petition for Labor Code section 132a

violation is barred, in whole or in part, by the statute of limitations.

"Having reviewed the voluminous documentary evidence and considered the testimony and credibility of numerous witnesses called during the course of multiple full days of regular hearing, the WCJ concludes that defendant did not discriminate against applicant in a statutorily proscribed manner. Rather, the evidence considered as a whole establishes that applicant did not return to employment at Schlage Lock due to elimination of his job position as a result of business necessities. Ample evidence exists to support to this conclusion, including the credible testimony of Claudia Melteff, Thomas Abbott, Jr., Lee Edward Hoffman, Eduardo Acosta, and even portions of applicant's own testimony.

"Ms. Melteff testified credibly that she was employed by Schlage Lock since 1971 and she was the plant human resources manager in 1986 while applicant worked for that company. Applicant's employment position was eliminated while he was out on medical leave as documented by applicant's exhibit "15." The June 20, 1986 letter indicated that: (a) applicant's position as plant administrator was eliminated as a part of restructuring and downsizing; (b) the business decision did not automatically sever applicant's relationship with the company; and (c) when authorized by the doctor to return to work, applicant would be considered for any available openings. Each of the elements discussed in the letter

is corroborated by other documentary evidence and credible evidence and credible testimony of various witnesses.

"The great weight of the evidence establishes that Schlage Lock was in the throes of major reorganization in the mid-1980's designed to streamline its operations and save costs. Mr. Abbott credibly testified (as a twenty-seven year employee of Schlage Lock and as applicant's immediate supervisor when he worked at the Tecate plant as plant administrator) that he first learned applicant's employment position was going to be eliminated four to six months after applicant's industrial injury. Mr. Abbott had been assigned to supervise the Tecate plant in 1986. Schlage Lock contracted with an American company as a vendor and that company, in turn, contracted with the Mexican company. General dissatisfaction existed with the timeliness and quality of delivery of vendors assigned to the Tecate plant. Applicant was initially hired to address those concerns as the plant administrator of the Tecate plant. Mr. Abbott indicated that defendant's exhibit "A" establishes applicant would have received notice of the reorganization efforts as part of the normal distribution of the memo. Defendant's exhibit "A" consists of an interdepartmental memorandum dated January 21, 1986, which discussed major restructuring to be implemented between the years 1986 and 1989. Mr. Abbott was emphatic that negotiations were well under way in January 1986 to bring on board Collectron as a shelter company.

"According to Mr. Abbott, Collectron became responsible for the duties which applicant had handled before his industrial injury on March 3, 1986. Those duties included obtaining necessary permits, ensuring transit of workers, etc. The reorganization of the Tecate plant was part of a larger restructuring effort which included, for example, reorganization of the Rocky Mount facility in North Carolina. That facility closed in 1984 or 1985 resulting in a loss of 1,000 to 1,200 jobs.

"Mr. Abbott testified that Collectron's involvement at the Tecate plant meant Ensambles Mecanicos, a vendor applicant had worked with, was no longer needed. Collectron had its own employees. Applicant's position was not eliminated because of his industrial injury; rather, developments at the Tecate plant which were part of a larger pattern of reorganization resulted in elimination of applicant's job position.

"The testimony of both Mr. Acosta and Ms. Melteff is consistent with the testimony of Mr. Abbott and establishes a credible and legitimate business reason for the termination of applicant's job position. For example, Ms. Melteff testified that as plant personnel manager, she was aware of discussions being held in mid-1985 with Collectron of Arizona to provide administrative services at the Tecate plant. Schlage Lock was dissatisfied with the vendors for various reasons which included

high labor turnover, inability to control costs, and trouble shipping items across the border. Ensambles Mexicanos was one of those vendors. Applicant's job duties were ones which were taken over by Collectron and his position as plant administrator was eliminated for reasons wholely unrelated to his industrial injury.

"Mr. Acosta testified that he has been employed by Collectron for twelve years. Tecra of Mexico is a division of Collectron of Arizona which was formed in early 1986 to give support services to Schlage Lock in Mexico. It was a shelter company for Schlage which had a facility in Tecate. Tecate was to provide administrative and not technical services. Mr. Acosta became the administrative manager of the Tecate plant.

"Although Collectron legally took over operation of the Schlage Tecate plant on October 1, 1986, Mr. Acosta indicated that the company was initially approached sometime in 1984 or 1985 to operate a shelter program for Schlage Lock. Mr. Acosta confirmed that the duties performed by Collectron were generally the same ones which applicant performed.

"The testimony of Lee Edward Hoffman, a witness called by applicant, was viewed by the WCJ as being entitled to less than full weight. Mr. Hoffman's testimony at regular hearing was impeached on several material points by his earlier deposition testimony. For example, Mr. Hoffman indicated his

separation from Schlage Lock was amicable when he testified at deposition that it was not. He also testified at regular hearing that he was unaware prior to January 1986 that Collectron was taking over the Tecate plant, but he indicated the opposite in his deposition. Nonetheless, Mr. Hoffman confirmed at regular hearing that he was aware the company was constantly being reorganized in 1986 and that he was aware as of mid-1985 of the discussion of various options. Collectron took over management of all plants on the Mexican side of the border and Mr. Hoffman understood that a majority of the management duties assumed by Collectron were ones previously performed by applicant.

"Furthermore, the evidence does not reliably establish that Schlage Lock ever actually terminated applicant's employment. [emphasis added.] Applicant's exhibit "13" establishes that he was placed on an unpaid leave of absence effective on the March 3, 1986 date of his industrial injury. In a letter dated March 31, 1986 (applicant's exhibits "8" and "9"), applicant inquired regarding the company's workers' compensation coverage. Applicant signed a notice of claim on April 16, 1986 as evidenced by applicant's exhibit "11." However, personnel at Schlage Lock still expected applicant to eventually return to work as documented by the May 12, 1996 letter which was admitted into evidence as applicant's exhibit "5." Even the notice of termination which was prepared on June 23, 1986, to be effective June 27, 1986 [emphasis

added.], indicated that no replacement was required for applicant.

"In a letter dated June 17, 1986 (applicant's exhibit "14"), applicant wrote to Schlage Lock that he wanted to receive a severance check which had been offered the preceding Monday. There is conflicting evidence whether applicant's employment relationship with Schlage Lock was considered by any of the involved parties to be terminated as of June 1996, but it is clear that his position as plant administrator was eliminated and that efforts to place him in alternative job openings with the company were unsuccessful.

"Ms. Melteff's letter of June 20, 1986 indicated that applicant would be considered for any available job openings when he was authorized by his doctor to return to work. [emphasis added.] Applicant testified that he first provided the company with such a medical release in December 1987. Dr. Grisolia may have returned applicant to work on a trial basis on July 23, 1986 (applicant's exhibit "18") [emphasis added.] but there is no indication that information was conveyed to the employer. Similarly, Dr. Kane indicated applicant could return to work on June 17, 1986 applicant's exhibit "19"), but his letter was dated December 17, 1987 and was directed "to whom it may concern."

"In summary, the evidence does not preponderate in favor of the conclusion that defendant discriminated against applicant

because of his industrial injury. To the contrary, the evidence shows that applicant was caught up in a much larger restructuring campaign which resulted in elimination of his employment position while he was coincidentally out on medical leave of absence. Applicant did not present defendant with a medical release to return to work until December 1987 long after Collectron had taken over the Tecate plant.

"In light of the evidence reviewed, applicant has failed to demonstrate by a preponderance of the evidence that defendant unreasonably failed to provide workers' compensation benefits. The evidence introduced by applicant on this subject is simply insufficient to meet his burden of proof."

In essence, applicant contends the WCJ should have found his testimony, and not the testimony of defendant's witnesses, to be credible. For reasons fully discussed in the opinion on decision, the WCJ found that applicant had not borne his burden proof of establishing discriminatory conduct on the part of the employer. Furthermore, the weight of the evidence establishes that applicant's employment position was eliminated for reasons of business necessity. The fact that the WCJ weighed the evidence in a manner displeasing to applicant does not justify granting the petition for reconsideration.

Applicant's argument that procedural and evidentiary errors prejudiced

presentation of his claims strikes the WCJ as incredulous. Contrary to applicant's belief, the WCJ afforded him far greater latitude to develop the evidentiary record than required by the rules of evidence or procedure which, nevertheless, are not binding on the Workers' Compensation Appeals Board. Applicant has failed to demonstrate any manner in which a perceived error in a ruling by the WCJ prevented him from fully presenting his case. Review of the voluminous pleadings generated by the parties will demonstrate otherwise.

It should be noted that applicant has requested a full transcript of the proceedings from the multiple days of regular hearings. While the WCJ welcomes review of such a transcript because it would reveal the extraordinary latitude granted to applicant to develop his case, such a transcript would appear to the WCJ to be unnecessary. The summaries of evidence prepared at the conclusion of each session of the regular hearing are fair, complete, and accurate.

RECOMMENDATION

For the reasons discussed, it is respectfully recommended that the petition for reconsideration be denied.

DATED: August 13, 1997

Filed and Served by mail on:
On all parties
on the Official Address Record
By: /s/ Marilyn McGaughy

Marilyn McGaughy

/s/ Ronald W. Smitter
RONALD W. SMITTER
WORKERS' COMPENSATION JUDGE

APPENDIX D

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA
Case No. SDO 114450

DAVID SELINGER, Applicant,
v.
CONTINENTAL CASUALTY COMPANY,
Defendant.

ORDER DENYING RECONSIDERATION

We have considered the allegations in the Petition for Reconsideration and contents of the report of the workers' compensation referee (WCR) with respect thereto. Based on our review of the record, and for the reasons stated in said report which we adopt and incorporate, we will deny reconsideration.

With regard to petitioner's request that the transcripts of the proceedings herein be reviewed, petitioner failed to allege specific material defects in the WCR's Summaries of Evidence necessitating such review. (See Allied Compensation Insurance Co. v. IAC (Lintz) (1961) 57 Cal.2d 115, 26 Cal. Comp. Cases 241.) Moreover, we take specific note of the last paragraph of the WCR's discussion at page six of his report with regard to the transcript request.

We also note that WCAB Rule 10242 (Cal. Code Regs., tit. 8, section 10848) provides that supplemental petitions, pleadings or

responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board, and otherwise shall neither be accepted nor deemed filed for any purpose. In view of the extensive record in this case, including two boxes of documents and pleadings and that applicant has filed a petition for reconsideration of over 100 pages, further pleadings are deemed neither necessary nor helpful to reaching our decision herein.

For the foregoing reasons,

IT IS ORDERED that said Petition for Reconsideration be, and it hereby is, DENIED.

WORKERS' COMPENSATION APPEALS BOARD
/s/ Arlene N. Heath
I CONCUR,
[signature unintellible]

CONCURRING, BUT NOT SIGNING
Colleen S. Casey

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
SEP 12 1997

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

vpd /s/ C Lage

[SEAL OF WORKERS' COMPENSATION APPEALS BOARD]

APPENDIX E

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE
STATE OF CALIFORNIA

DAVID SELINGER, PETITIONER
V.
WORKERS' COMPENSATION APPEALS BOARD AND SCHLAGE LOCK COMPANY,
RESPONDENTS

D029696
(WCAB NO. SDO114450)

FILED
STEPHEN M. KELLY, CLERK
JAN 30 1998
COURT OF APPEAL FOURTH DISTRICT

THE COURT:

The petition for writ of review, answers and reply have been read and considered by Presiding Justice Kremer and Associate Justices Huffman and Nares.

Review of a decision of the Workers' Compensation Appeals Board (WCAB) is limited to whether the WCAB acted without or in excess of its powers and whether the order, decision or award was unreasonable, not supported by substantial evidence or procured by fraud. (Lab. Code, section 5952.)

Petitioner raises 17 claims of error with the WCAB's decision he was not discriminated against because of his industrial injury in violation of section 132a and that payment of benefits was not unreasonably delayed or denied in violation of section 5814. The bulk of petitioner's claims of error dispute the WCAB's factual findings and are not with our scope of review. To the extent petitioner contends the WCAB's decision is not supported by substantial evidence, petitioner has failed to provide a sufficient supporting record for review. (See Nielsen v. Workers' Comp. Appeals Bd. (1985) 164 Cal.App.3d 918, 923.) Rule 57(a) of the California Rules of Court requires the petition must fairly state all material evidence relative to the point at issue. The petition must also include all relevant exhibits. Although petitioner provided a "statement of material facts" with reference to trial minutes and summaries of evidence, the minutes and summaries were not provided. Only selective exhibits were provided.

The petition is denied.

/s/ Nares
NARES, Acting P.J.

Copies to: All parties

APPENDIX F

Fourth Appellate District, Division One, No.
D029696
S067917

IN THE SUPREME COURT OF CALIFORNIA

[STAMP:]

FILED
MAR 18 1998
Robert Wandruff Clerk
DEPUTY

SUPREME COURT
DAVID SELINGER, Petitioner
v.
WORKERS' COMPENSATION APPEALS BOARD
Et Al., Respondents

Petition for review DENIED

GEORGE

Chief Justice